Supreme Court, U. S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Respondents and some of their *amici* have endeavored mightily to obfuscate both the true state of the record in the Trial Court and the employment practices of Respondents. Indeed, Respondents treat the record as if there was no such thing as the "substantial evidence rule." Furthermore, they and certain *amici* attempt to mislead this Court by suggesting that the Affirmative Action Program (AAP) in question, and ~~its,~~ resultant employment practices, were indeed designed to remedy past discrimination but that somehow Respondents neglected to argue this to the Trial Court. In fact, Respondents filed explicit post-trial Points and Authorities claiming that their practices were justified both by alleged prior discrimination *and* by "operational

necessity." Respondents alleged that the prison staff of the Department "has been almost exclusively white male" (Resp. Br. 43); yet the AAP itself points out that, at the time of its adoption, in comparison to the state labor force "Blacks are over-represented by approximately 2.5% of their expected proportion. . . ." Jt. App., p. 38. This is hardly an "exclusively white male" work force.

It is appropriate, after reviewing the briefs and claims, to look at what really was going on in the California Department of Corrections (CDC) and at what arguments were indeed made to the Trial Court.

A. The outrageous preferences and set-asides are not products of "misunderstandings" but were required by CDC's top management

That the acts complained of by Petitioners were not "misunderstandings" by low-level personnel is seen in the testimony, both oral and written, *of the top four officials of the Department,* namely Director Enomoto, Chief Deputy Director George Jackson, Assistant Director Carlos Sanchez, and Assistant Director for Women's Affairs, Dorothy Stevens-Roby. R.T. 353; 173. Three of these four testified that, under the AAP, a lesser-qualified minority or female would be hired or promoted over a more-qualified non-minority or male so long as they were at least reasonably close in qualifications. R.T. 307-8 (Enomoto); R.T. 382-383 (Sanchez); R.T. 690-691 (Jackson). Ms. Stevens-Roby testified that a lesser-qualified minority or female would be appointed over a non-minority or male even if there were "a substantial difference in the qualifications." R.T. 111-113.

Both the Director and the Chief Deputy rejected grievances explicitly challenging the advertisement of "minority only" positions, until the State Personnel Board (SPB) intervened. Exhibit 11. Although Enomoto said "I don't recall", about his statement that male Cau-

casians had to "wait about five years for promotions because vacancies would be filled with minorities who have had to wait too long. . . ." (R.T. 285), he did admit that the *only* thing wrong with the quotation was the period of time, i.e., the "five years." R.T. 285-286. However, Mr. Sanchez confirmed the five year period. R.T. 379.

The degree to which set-asides and preferences for lesser-qualified candidates was given was highlighted by the actions of three of the top four management personnel *after* the trial court had issued a preliminary injunction against the granting of preferences and while that Order was in effect. Only two months after the preliminary injunction had issued, a supervisor recommended a female non-minority candidate for the position of Assistant Chief of Institution Services. A memo suggesting that the recommendation be overruled was written by Ms. Stevens-Roby, to Enomoto, via Jackson. Ms. Stevens-Roby noted that "an appointment of a minority female would provide an ethnic and sex balance to this unit." Her recommendation was endorsed by Mr. Jackson with the comment, "agree strongly." Enomoto then passed over the first three persons recommended to him by the supervisor most familiar with the abilities of all applicants, and instead chose the fourth candidate on the list, the minority woman recommended by Ms. Stevens-Roby. These events were all described in a Application for Order to Show Cause and Order to Show Cause Re Contempt of Court, found at C.T. 659-669.[1]

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[1]Two full days of hearings on the Order to Show Cause re Contempt were held, April 20, and 21, 1977. The Court concluded that contemptuous action had occurred but decided to let the officials involved off on the assurances that no further violations of its Order would take place. Thus, the Court stated that it found Ms. Stevens-Roby's "contemptuous," and "in violation of the Court Order." Reporter's Transcript of proceedings of April 20 and 21, 1977, at R.T. 262 of those proceedings.

With regard to the Director himself, Mr. Enomoto stated in a memo, Exhibit 38, that in his search for an assistant for Ms. Stevens-Roby "the first priority was the recruitment of a Mexican-American male" to fill the position, but that "no *other* positions have been finalized." [Emphasis added.]

It is thus clear the set-asides and preferences are not mere "misunderstandings" by lower-level supervisors, middle-management personnel, or people "favorable" to Petitioners. Nor were the actions found at just a few institutions—they were widespread throughout the State. Why? Because Respondents made it clear that managers and supervisors would be judged on their willingness to carry out the dictates of top Department management. Thus, the AAP, as amended on April 1, 1975, in Exhibit "R", stated that top management must "assure that each manager within the division is responsible *and accountable for* meeting specific goals." [Emphasis added.] Enforcement of this policy was more energetic than the simple written statement found above: Mr. Enomoto let it be known that superintendents of various facilities would meet their goals "or else," otherwise, "their own positions might be on the line." R.T. 303 (Enomoto).

B. The set-asides and preferences were pervasive throughout the Department

These practices became wide-spread throughout the State. The superintendent (or "warden") at Soledad said he "wanted a female" for a certain position because he was "committed to the implementation of the Affirmative Action Program of the Department of Corrections." R.T. 71-73. In San Francisco, the position of "correctional case work trainee" was "to be filled by women" on "instructions from Sacramento." R.T. 119-121. At Chino, Caucasian candidates were not even considered for clerical positions, on

authority of the superintendent and associate superintendent of that facility. R.T. 710, 721-722, 724-725. The superintendent at Susanville intended to have between 55 and 60% of all appointments to be minorities (Exhibit 17); he saved positions for women (Exhibit 28); and he approved the appointment of a person described as "a full blooded Mexican which I am told by Mr. C. H. Hull meets all the Affirmative Action Requirements." Exhibit 30. That same superintendent regretted that he had to appoint a male Caucasian to a position in July of 1975, since "we recently have gone through the entire Affirmative Action procedure and *were unable to come up with either women or minorities* even after retesting." Exhibit 31 [Emphasis added].

A superintendent of another facility, Ms. Norma Law, testified on cross-examination by Respondents' attorney that she would hire or promote a less qualified minority over a non-minority to meet the "goal" of the Department of Corrections. R.T. 604-605.

C. The set-asides and preferences involved entry-level, as well as promotional positions

Respondents and at least two amici contend that there was no evidence presented below with regard to hiring and that the evidence only involved promotions. Yet, ample, stark evidence on hiring practices was presented.

The AAP applied to *all* appointments, including promotions and hiring. See Exhibit G, the first version of the AAP, found in the Joint Appendix, and Exhibit R. To implement the policy, a "screening" system was set up for all appointments. Mr. Senon Palacioz was placed in charge of Affirmative Action for "minorities," and Ms. Stevens-Roby was placed in charge of Affirmative Action for women. All appointments had to be cleared through those two persons (R.T. 228), who would ascertain the race or the sex of the people being recommended to see if

the recommending person "has taken into account the Affirmative Action policies of the Department." R.T. 359; R.T. 228; R.T. 331-333; R.T. 193-194.

At entry level, persons applying *to be hired* had their race noted by numbers or letters placed on their application forms or other documents used to decide appointments. R.T. 136-137; 719-722. Mr. Jack Mayo, a Records Officer III, was ordered to mark the applications of minority candidates to indicate their race but was to put down no marking if the applicant were Caucasian. R.T. 702-721.[2]

These policies did not distinguish between entry-level and promotional positions. At Chino, the person in charge of hiring clerical workers was instructed not even to consider Caucasian candidates. R.T. 710. In order to obtain minority employees for the entry-level positions in question, the positions were down-graded from "Typist II" and "Typist I" to "Seasonal Clerk." R.T. 715.

D. The Trial Court record is clear as to Respondents' "prior discrimination" defense

Respondents and some *amici* suggest that the defense of "remedying past discrimination" had not occurred to Respondents' counsel during trial, supposedly because then-current appellate cases dealing with employment discrimination had not discussed the issue of alleged past

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[2]This witness is accused of racism by Respondents. Resp. Br., fn. 6, p. 4. The citation given is to the testimony of Deputy Superintendent James Neiswonger. That testimony was, no doubt, disregarded by the Trial Court, since Mr. Neiswonger was shown to have retaliated against Mr. Mayo for Mayo's testimony at trial, causing the Court to issue an extraordinary order forbidding the CDC and its agents from carrying out such retaliation. See R.T. 814-818; C.T. 274-277. This order was made a part of the Court's Permanent Injunction, Pet. App. G-3. Finally Mr. Mayo explicitly denied ever making the statements described by Neiswonger. R.T. 816.

discrimination. This argument ignores the following inescapable realities of the record:

1. There never has been any nexus between the preferential employment practices adopted and any past discrimination by the Respondents; and,

2. Respondents clearly raised as a defense, in their post-trial Points and Authorities, a line of cases, *then* well-established, stating that employers, both private and public, could take affirmative steps to remedy past discrimination. See in that regard, "DEFENDANTS' FINAL ARGUMENT: POINTS AND AUTHORITIES," commencing at C.T. 278, and particularly at C.T. 284. The post-trial Brief of Respondents cited the California Supreme Court's *Bakke* decision that, in employment situations, an employer might, consistent with the Constitution, take action to remedy past discrimination. This post-trial brief stated that "These cases held that even preference in employment could be maintained where prior discrimination existed." [citations omitted] C.T. 284.[3]

Frankly, Respondents and their supporters obfuscate and misstate the evidence and the factual conclusions of the trial court, as if the "substantial evidence" rule did not exist, and, indeed, as if the trial court had found in their favor and the roles of Petitioners and Respondents were reversed. The truth is that a Department of our largest state has, in pursuit of some societal goal deemed desir-

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[3]This legal point was not disputed by Petitioners in their Post-Trial Brief. Petitioners simply pointed out that there had been no past discrimination, that the AAP was not designed to correct same, and that a truly remedial plan must take into account the interests and expectations of innocent co-workers. C.T. 362-366. This last point is one we again urge here, with the added suggestion that this Court's decision in *I.B.T. v. U.S.*, 431 U.S. 324 (1977) sets the appropriate equitable standards for such a plan. Pet. Opening Bf., pp. 47-48.

able by certain bureaucrats, adopted a program totally inconsistent with equal protection under the law and is now scurrying around to forestall review of its activities or to obtain a chance to construct, for the very first time, a *post hoc* justification for its actions.

ARGUMENT

I

THE FOURTEENTH AMENDMENT BARS THE RACIAL AND SEX-BASED PREFERENTIAL EMPLOYMENT PRACTICES OF THE DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN

Faced with this Court's ruling in *Fullilove v. Klutznick*, ... U.S. ...., 48 U.S.L.W. 4979 (July 2, 1980) and the clear intent of the framers of the Fourteenth Amendment, discussed in our Opening Brief, pages 22-23, Respondents and supporting *amici* concede that indeed the Department's AAP can be justified only if it meets the "strict scrutiny" standards articulated by this Court.

Please note that the Permanent Injunction only forbade the granting of "preference" because of race, sex or national origin, rather than forbidding "consideration" of race or sex.

But what the evidence revealed was that people were being totally shut out of the process because of their race or sex, and that racial or sex-based preferences became a "but for" cause of a lesser-qualified minority or female candidate getting the appointment in question. The preliminary determination of qualifications included the numerous factors common in a management decision-making process, including personnel evaluations, attendance records, interviews, personal drive, and "ability to relate to

inmates." R.T. 690-691; R.T. 304-308. Yet, once CDC officials evaluated relative qualifications (including assessing ability "to relate" to inmates), department policy still mandated that lesser-qualified minorities or women be promoted. Both the complete set-asides and the appointment of lesser-qualified individuals, even where non-minorities or males were allowed to compete, require far more justification under the standard of "strict scrutiny" than has been shown by Respondents.

A. The AAP Was Not Designed To, Nor Did It, Remedy Any Alleged Past Discrimination of Respondents

When the AAP was adopted (Exhibit "G", found in the Joint Appendix), Blacks were *"over-represented"* in the Department (Jt. App. pg. 38) and, as to minority groups, "Spanish surname" personnel were under-represented, while Asian, Native American, and "Other" were over-represented, all in comparison to their representation in the California labor force.

For promotions, there was no significant statistical disparity between those competing for promotions, by race, and those promoted. Thus, Black personnel, constituting 8.8% of the CDC work force, received 8.4% of the promotions, while Spanish surname personnel, representing 7.4% of the work force, received 8.1% of the promotions. Jt. App. pg. 30-31. Faced with these labor force figures, which belied any claim of "under utilization" or "adverse impact," let alone past discrimination, CDC attempted to maximize minority representation by requiring the racial composition of its work force to mirror the inmate population, not the California labor force or the Department's applicant pool. To maximize the goal or quota for females, however, the Department seized upon the percentage of women in the labor force, because the female inmate population was a very low percentage. The percentage of

females in the *applicant* pool was ignored. Although given the opportunity to present evidence relevant under the teachings of *Hazelwood School Dist. v. U.S.*, 433 U.S. 299 (1977), CDC never introduced evidence comparing the racial or sexual composition of new hires to the applicant pool. Why? Because CDC literally does not know whether it hires minorities and/or women at a greater or lesser rate than those who seek entry-level positions. R.T. 280-282. Is it overly cynical to suggest that Respondents' ignorance in this regard is the product of disinterest? The purpose of the AAP has not been to remedy any past discrimination but has been to achieve a dubious goal of social engineering propounded by certain managerial bureaucrats.[4]

1. The AAP Implemented By Managerial Officials in the Department of Corrections Was Not Mandated Nor Authorized by Any Findings or Statutes of the Legislature of the State of California

Respondents, instructed by *Fullilove*, attempt yet another *post hoc* justification, articulated for the first time in this Court. By letter of October 17, 1980, Respondents lodged with the Court documents which they hope will cause the Court to believe that the AAP deserves the same deference as the findings of Congress in *Fullilove*.

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[4]Contrary to the assertion, Resp. Br. page 33, Petitioners did not contend that consideration of race or sex by a state agency is *per se* unconstitutional, under all factual conditions. The Points and Authorities cited at C.T. 207-211 dealt with a situation in which a public entity demonstrated no compelling state interest, or less intrusive means, and race or sex played a role in the decision-making process. Petitioners contended in the trial court, and contend here, that once race or sex becomes a factor (and the best analytical way of thinking of it is to consider it a "but for" factor) in the decision-making process, then the "strict scrutiny" standard comes into play.

A close review of all those documents shows that at no time did the California legislature make any *finding* of past discrimination by the State, or any agency thereof, let alone by CDC. A close reading of Respondent's Brief at pages 37-43 shows that neither the State nor Governor Reagan ever authorized or mandated the sort of actions described here.

What one does find are statements that "affirmative action" is appropriate to achieve equal employment opportunity. But nowhere in the documents does one find a statement, a finding, or a mandate by the legislature or Governor Reagan that anything other than equal treatment among citizens should apply. We suggest that there is a world of difference between certain types of "affirmative action" policies (such as aggressive recruitment, education of supervisory and managerial personnel, strict policing of non-discriminatory policies, etc.) and the set-asides and preferential practices employed by CDC. Many of the former type of activities are described in the AAP, Jt. App. pages 20-27. As the trial court found, Petitioners have never challenged such racially and sexually neutral affirmative action policies. Finding 9, Pet. App. F-4.

However, we suggest a distinction between such neutral policies and those involving preferential employment practices (PEP) in which race or sex becomes a "but for" cause of someone receiving an appointment.

While "affirmative action" was discussed in those documents, preferential employment practices certainly were not, and there were no findings either by the legislature or the Chief Executive that the State in general, or CDC in particular, had ever engaged in past discrimination. Our great respect for opposing counsel forces us to conclude that the descriptions contained in fn. 53, Resp. Br. p. 41, are the product of over-zealous advocacy. Assemblyman

Deddeh simply did not say that the State had engaged in prior discrimination. See the Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Equal Employment Opportunity in State Service (September 12, 1974) at 2-3. Further, the Supplemental Report to Assembly Committee on Public Employees and Retirement, by the State Personnel Board, at page 1 (December 4, 1975) stated that discriminatory practices remain "deeply embedded in *our basic institutions*" [emphasis added], not "in the State's employment structure," as claimed by Respondents.

Whatever strained interpretation Respondents make of the documents lodged with the Court, it is clear that the documents and findings do not come close to being the sort of considered judgment of a legislature necessary to survive the strict scrutiny standards of *Fullilove*.[5]

2. Respondents and Their Supporting Amici Still Fail to Show Any Nexus Whatsoever Between the AAP as Implemented and Any Alleged Past Discrimination

The complete record at trial, including the text of the Affirmative Action Plan, both in its original edition and as amended, Exhibits "G" and "R", respectively, is devoid of any mention as to how the Plan's design or operation would remedy any past discrimination against minorities and women.

Minorities receive preference *only when parity with the inmate population has not been achieved,* either Depart-

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[5]The Court should also note that the Government Code sections relied upon as authorization for this AAP were not even passed until *after* the trial in this case. Government Code §§ 19790 *et seq.*, found in Resp. Br. A-3 to A-7, were passed in mid-1977, to become effective beginning in 1978. Those sections mention only "Affirmative Action" and do not mandate any sort of preferential employment practices.

ment-wide or at a particular facility. R.T. 186-188 and 195 (Testimony of Dorothy Stevens-Roby); R.T. 309-310 (Director Enomoto); R.T. 374-376 (Carlos Sanchez). The chances of the same two people, one a minority and one a non-minority, varies with regard to job opportunities, depending on whether or not there is "parity" at the particular institution involved. R.T. 309; R.T. 376. If parity has not been reached with the inmate population, then the minority receives preferential treatment. If parity had in fact been reached with the inmate population, then the Department simply hires the most qualified person. R.T. 691.

Even if this Court ignored the substantial evidence rule, and even were it to accept without question the evidence introduced by Respondents at trial concerning past discrimination, and ever were it to accept the materials contained in Respondents' Motion to Augment Record,[6] the simple fact is that the AAP, as implemented, was and is in no way connected with any such alleged past discrimination. As such, the lost opportunities and disappointments of non-minority or male correctional officers cannot be justified under constitutional standards.

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[6]Petitioners do object most strenuously to the inclusion in Respondents' brief of their Appendix "B", a purported "Summary of the Facts", containing an additional eight (8) pages of description of materials contained in their Motion to Augment Record. The inclusion of such materials amounts to an evasion of this Court's Order of October 3, 1980, permitting the Respondent to file a brief not to exceed sixty (60) pages. The materials contained in the brief, not counting the Summary of the Facts found in Appendix "B", was sixty (60) pages alone, and with Appendix constituted sixty-eight (68) pages.

Furthermore, those same materials, and any reference thereto, were stricken from the appellate record by the Court of Appeal of the State of California, by virtue of its Order of January 10, 1979, in response to a Motion to Strike by Petitioners. App. "A'" herein.

B. Respondents' Defense of "Operational Necessity" Was Not Established, Does Not Meet The Standards Of Strict Scrutiny, and in Fact Will Only Encourage Racial Polarization and Stereotyping in Our Society

Once again, the substantial evidence rule and the findings of the Trial Court preclude Respondents from contending that the alleged "operational necessity" of reducing violence in the prisons justifies their practices. Experts having prior access to the myriad of materials cited by Respondents here did testify at trial.[7] There was substantial, indeed overwhelming, evidence presented to show that the ability of correctional officers to relate to or establish rapport with inmates, and thus potentially to reduce violence, varies with the individual, and is not determined by the race or sex of the correctional officer or inmates involved. E.g., R.T. 754-757. Respondents never even attempted to demonstrate that there were insufficient numbers of correctional officers of all sexes and races, in all facilities, to serve the needs described in the sociological arguments found at pages 43-50 in their brief—even were one to assume such arguments to be valid.

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[7]By their use of the various sociological articles and treatises cited in the above-mentioned portion of their brief, Respondents attempt to introduce into the record here the sort of materials upon which their, and Petitioners', experts, can and should have been questioned and cross-examined in the trial court. The materials clearly are not sufficiently "indisputable" to allow the Court to take judicial notice thereof. *Hawkins v. U.S.*, 350 U.S. 74 (1958). Books, treatises, and general publications cited by the Respondents, with respect to the alleged effects of the use of race and sex in employment levels and reducing violence in the prisons and in fostering inmate rehabilitation, were in fact hotly disputed by the Petitioners in the trial court, and were rejected by that Court.

This is the second attempt by Respondents to introduce into the appellate record evidence in support of their "operational necessity" defense. The first attempt resulted in the Court of Appeal striking from the appellate record such sociological theories not discussed or relied upon by experts in the trial court. The text of the Order

In fact, these arguments are without merit, as the briefs of various *amici* demonstrate. With the salient exception of the New York State Department of Correctional Services and the City of Detroit, the numerous friends whom Respondents found among the *amici curiae* promptly develop a case of "constitutional cold feet" when it comes to the Respondents' defense of "operational necessity." Both the AFL-CIO and EEOC point out the incredible dangers of accepting the "operational necessity" defense. See AFL-CIO brief, pages 26-29, and brief of USA and EEOC, pages 26-29. Those *amici* express the same grave concerns urged by Petitioners at all levels of this litigation that the practices engaged in here, having no nexus with remedial action but intended simply to mirror a "service population," will only perpetuate the sorts of racial and sexual prejudices, stereotypes, and divisions that have so plagued our society to date.

C. Respondents Have Failed to Show That There Were No Other Alternatives to Achieve a Higher Percentage of Minorities or Women in the Work Force, Even Were That a Proper State Objective

In their brief, at pages 51-56, Respondents ignore Petitioners' contention that Respondents failed to show there were no less intrusive means to increase the percentages of minorities and women in the correctional work force, assuming this to be a necessary and legitimate State objective. Energetic recruitment, temporary training appointments, and a myriad of other racially and sexually neutral policies described in some detail in those portions of the AAP not challenged may well have, without preferential practices, achieved an increase in minority and female representation at all levels in the Department. Please note the absence of contrary evidence in Resp. Br. pp. 55-56. Under

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of the Court of Appeal of January 10, 1979 is found in Appendix "A" to this Brief.

strict scrutiny standards, Respondents had the burden of making such a showing, and a heavy one, at that.[8]

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS A FINAL JUDGMENT

Whether the California Court of Appeal Decision is final under California law is not relevant. The issue is whether the Decision is appealable and final under federal law. The California Court of Appeal, while ignoring the substantial evidence test, definitely ruled that the Respondents use of racial and sex-based preferences are justified by the compelling state interest of maintaining a safe and efficient correctional system.[9]

In the event of retrial, no *post hoc* justifications need be offered by Respondents for the adoption and implementation of their AAP since the Trial Court will be

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[8]Indeed, the majority of Respondents' brief here is devoted to invoking the reasoning of *Fullilove* as to the protections of "administrative oversight," suggesting that there are means by which Caucasian or male correctional officers can appeal or protest discrimination practiced against them. Thus, at pages 52-54 of their brief, Respondents suggest that a Causasian or male officer may appeal to the State Personnel Board. However, the record is replete with examples of the SPB rejecting such grievances even where the written responses by Department officials acknowledged that they were saving positions for minorities or women. See, for example, Exhibits 1-4 in the court below, wherein the SPB denied the grievance of plaintiff Minnick, even though the Department acknowledged "We are attempting at this time to fill the CPS II position with a qualified minority or female." [Exhibit I] That sort of "administrative oversight" hardly meets the strict standards articulated by this Court in *Fullilove*. Assigning the SPB to police the sort of preferential practices engaged in here is like sending the goat to guard the cabbage.

[9]". . . the practices applied the prison-related realities of race and sex to the point of prompting a 'compelling state interest' in a safe and efficient correctional system." Pet. App. A-15-16.

bound to uphold the use of racial preferences based upon the purported "operational needs" of the Respondents. Under California law, the principle of "law of the case" is definitive.

> "Where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular . . . Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important." *Tally v. Ganahl,* 151 Cal. 418, 421 [1907].[10]

Thus, there is no evidence which Petitioners could introduce to the Trial Court to overturn the law of the case upholding the constitutionality of the racial and sex-based preferences granted. This constitutes the "practical finality" which this Court has denominated as sufficient for United Supreme Court jurisdiction over state court judgments:

> "Today the test is not whether under local rules of practice the judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547 (1947).

To give the Respondents the opportunity to advance additional *post hoc* justifications for their preferential em-

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[10]See also *Pigeon Point Ranch v. Perot,* 59 Cal.2d 227, 232 (1963); *People v. Durbin,* 64 Cal.2d 474, 477 (1966).

ployment practices will not effect the outcome of the state court proceedings, which have been preordained by the resolution of the federal issue. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975), and *Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963). The requisite finality is satisfied where federal rights asserted are disposed of, notwithstanding the remand for further proceedings or re-trial. *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 562 (1914); *Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 386 (1964); and *Cox Broadcasting Corp. v. Cohn, supra.*[11]

PETITIONERS HAVE STANDING IN THIS COURT

The Trial Court made numerous findings (all supported by substantial evidence) that Petitioner California Correctional Officers Association adequately represented the interests of its members who had been and would be affected by Respondents' discriminatory practices, and that the individual Petitioners Minnick and Darden had been discriminated against by such practices and would

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[11]The United States and the Equal Employment Opportunity Commission attempt to limit the holding of *Cox* to situations in which further proceedings in state court are on non-federal issues. (Brief at p. 8). In fact, *Cox* stands for the proposition that where there is finality of judgment with respect to a federal issue, ***even though*** there are state law issues unresolved, the requisite finality exists for the purposes of U.S. Supreme Court jurisdiction. 420 U.S. at 485. In *Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 386 (1964), the Court noted that despite the fact that separate and unresolved issues were pending in the Ohio Court subject to "further proceedings", it "does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or un-appealable within the meaning of 28 U.S.C. § 1257." Id. at 389, fn. 4. There is no conceivable exception to the rule, especially where, as here, the decision was based solely on federal law, and there are no adequate and independent state grounds.

be affected in the future by the implementation of the Respondents' AAP with respect to job opportunities. (Findings of Fact, Nos. 3, 10, 12, 14, 15; Pet.App.F-3 through 5.) As set forth in the Petition at p. 9, although the Petitioners conceded at trial that Minnick and Darden would not be entitled to monetary damages, it was stipulated by all parties at trial and ordered by the Court (C.T. 1194), that their standing *and* that of CCOA would not be affected with respect to prospective and injunctive relief. As the record reflected, there were correctional officers who were certifiable within the "Rule of Three" who had been denied promotion and who had testified that they were willing to be amended into the action as Plaintiffs. R.T. 7-14. At any point before entry of Judgment, they could have been added to the case as plaintiffs. It is for this reason that the Respondents have never themselves raised the issue of standing at any level of these proceedings.

It is apparent that CCOA alone had sufficient legal standing to sue on behalf of its members, who "have been, or are being, or will be disadvantaged" by the Respondents' discriminatory practices (Finding of Fact No. 3), under both Federal and California law. *Professional Firefighters Inc. v. City of Los Angeles*, 60 Cal.2d 276 (1963); *IAFF v. City of Palo Alto*, 60 Cal.2d 295 (1963); *Allee v. Medrano*, 416 U.S. 802 (1974); *Warth v. Seldin*, 422 U.S. 490 (1975). Thus, in *Warth v. Seldin, supra*, this Court stated as follows:

> "The association must allege that its members *or any one of them*, is suffering immediate or *threatened injury* as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." 422 U.S. 490, 511. [Emphasis added.]

Additionally, although the individual Plaintiffs-Petitioners were held to have been injured by and subject to future discrimination by Respondents' practices, even if they had not been, it was within the sound discretion of the Trial Court to determine whether or not the Plaintiffs could still adequately represent the class. See *LaSalla v. American Savings & Loan Association*, 5 Cal.3d 864, 871 (1971), where the California Supreme Court cited various California, as well as federal, cases to support this proposition, including *Buckner v. County School Board of Greene County, Virginia,* 332 Fed.2d 452 (4th Cir. 1964) and *In Re William M.,* 3 Cal.3d 16, 23-24 (1970). Under California law, if the Court concludes that named plaintiffs cannot adequately represent the class, "it should afford them an opportunity to amend their complaint to re-define the class or to add new individual plaintiffs." *Scott v. City of Indian Wells,* 6 Cal.3d 541, 550 (1972).

STATE COURTS HAVE CONCURRENT JURISDICTION OVER TITLE VII ACTIONS

Respondents, joined by numerous *amici curiae* anxious to avoid a resolution on the record and on the merits, contend that jurisdiction over Title VII actions is lodged solely in the United States District Courts. The EEOC itself admits ". . . the question is not without difficulty. . . ." EEOC and USA brief at page 15. Indeed, the EEOC candidly acknowledges that it previously has filed a brief as an *amicus curiae* urging concurrent jurisdiction. Fn. 9 of EEOC brief, at page 15. Furthermore, as the EEOC again recognizes, since 1977 its "right to sue letters" have deleted any reference to the right to sue ". . . in the appropriate United States District Court. . . ." *Id.* This is surely the reddest of the herrings contained in the briefs of Respondents and their supporting *amici*, since, if the State court had no Title VII jurisdiction, then the Court of

Appeal judgment is all the more final and the constitutional claim all the more clearly before this Court.

The State courts, if they are willing to accept it, can and should have concurrent jurisdiction. Thus, in the seminal case of *Claflin v. Houseman,* 93 U.S. 130 (1876), the Court stated the general rule that concurrent jurisdiction is affirmed "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." 93 U.S. 130, at 136. See also *Dowd Box Company v. Courtney,* 368 U.S. 502 (1962) (Section 301 suits under Labor Management Relations Act of 1947); *Safe Workers' Organization v. Ballinger,* 389 F.Supp. 903 (S.D., Ohio 1974) ("Bill of Rights" suit under LMRDA); *Testa v. Catt,* 330 U.S. 386 (1947) (Emergency Price Control Act); and M. Redish & S. Muench, *Adjudication of Federal Causes of Action in State Court,* 75 Mich. L.Rev. 311 (1976).

In California the situation is unequivocally clear that both the California legislature and the California judiciary are willing to enforce in California courts, as a matter of concurrent jurisdiction, Title VII claims. Thus, California Government Code § 19702.1 reads as follows:

> "Hiring and promotion pursuant to this part shall conform to the Federal Civil Rights Act of 1964." (Page A-1 of Appendix To Respondents' Brief).

The California Supreme Court has imposed upon the lower courts of California, as a matter of "comity," the absolute obligation to entertain wholly federal causes of action arising under the Civil Rights Act of 1864 (42 U.S.C. §§ 1981, *et seq.*). *Brown v. Pitchess,* 13 Cal.3d 518 (1975). More significantly, for our purposes, the California Supreme Court in *Price v. Civil Service Commission,*

26 Cal.3d 257 (1980), *cert. denied,* ..... U.S. ..... (1980), clearly indicated its acceptance of concurrent jurisdiction under Title VII.

The alleged procedural problems described by Respondents and their *amici* do not exist under Title VII procedures, either with regard to conciliation efforts or proceeding in State courts once a "right to sue" letter has been received. Exclusive, as opposed to concurrent, jurisdiction in the federal courts will only result in a deluge of litigation there, or multiplicity of actions in both federal and state courts.

THE GUIDELINES OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA) NEITHER REQUIRE, NOR PERMIT, A SPECIFIED LEVEL OF MINORITY EMPLOYMENT

Several *amici* advance the contention that all the Respondents were doing was complying with LEAA guidelines. However, as noted by the EEOC and USA, at page 29 of their brief, the LEAA guidelines neither require, nor permit, either a quota or the seventy percent "mirroring" requirement which the Department adopted. The same brief (p. 29, fn. 25) neatly eviscerates that contention, and we respectfully refer the Court to that footnote, while pointing out that the Solicitor General concludes that ". . . it is the considered judgment of the LEAA that an institution's operational needs do not in general require a percentage of minorities in the work force mirroring that in the inmate population." P. 30, fn. 25.[12]

[12]That position is, of course, required by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §§ 3701 *et seq.*, which specifically precludes the conditioning of funds upon the implementation of a ratio or quota system. Thus, 42 U.S.C. § 3766(b) reads as follows:

Moreover, as the Solicitor General points out, not only have the LEAA guidelines never required the 70% "mirroring" adopted by the Department, but in 1977 the LEAA deleted the "service population" as the benchmark for determining when compliance reviews of recipient agencies would be conducted, substituting instead the "relevant labor market." See brief of EEOC and USA, p. 29, fn. 25.

CONCLUSION

For all of the foregoing reasons, Petitioners request that the judgment of the Court of Appeal of the State of California be reversed, with instructions to reinstate the JUDGMENT and PERMANENT INJUNCTION of the Trial Court.

Dated: November 24, 1980.

Respectfully submitted,

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Attorneys for Petitioners

(Appendix follows)

"Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program."

Appendix

No. 42545

Court of Appeal of the State of California
in and for the
First Appellate District

Division Four

Wayne Minnick, et al.,
Plaintiffs and Respondents,
vs.
California Department of Corrections, et al.,
Defendants and Appellants.

[Filed Jan. 10, 1979]

BY THE COURT:

The motion to strike portions of appellants' opening brief is granted. Those portions of said brief making reference to newspaper articles, books or treatises, which in no way were part of the record in the trial court and additionally were not cited or relied upon by any of the experts called by the parties, and any and all mention of documents submitted in the Motion to Augment Record filed in the trial court, is ordered stricken.

The designation of all such newspaper articles, books and treatises is attached hereto and made a part of this order.

Dated January 10, 1979

Caldecott, P.J.

Exhibit "A"

Page

ABA Commission on Correctional Facilities and Services, *A Correctional Must: Increased Staff Recruitment from Minority Groups* (1972) 61

ABA Commission on Correctional Facilities and Services, *Minority Recruitment in Corrections—New Federal Aid Requirements* (1973) 14

Association of State Correctional Administrators, *Uniform Correctional Policies and Procedures, Racial Issues* (1972) 61

Burdman, *Ethnic Self-Help Groups in Prison and On Parole*, 20 Crime & Delinquency 107 (1974) 54

Carroll, *Hacks, Blacks and Cons* (1974) 53, 61

Cleaver, *Soul on Ice* (1968) 54

Dean & Rosen, *A Manual of Intergroup Relations* (1955) 78

Denfeld & Hopkins, Racial-Ethnic Identification in Prison: *'Right On from the Inside,'* 3 Int.J. Criminology & Penology 355 (1975) 54

Epstein, *Intergroup Relations for Police Officers* (1962) 78

Fox, *Racial Issues in Corrections: Cultured Awareness—How to Achieve It*, in Proceedings of the 102nd Annual Congress of Correction of the American Correctional Association (1972) 54

Jackson, *Soledad Brother: The Prison Letters of George Jackson* (1970) 54

Jacobs, *Stratification and Conflict Among Prison Inmates*, 66 J. Crim. L. Criminology 476 (1975) 54

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Joint Commission on Correctional Manpower and Training, *Differences That Make The Difference* (1967) 59

Malcolm X and Alex Haley, *Autobiography of Malcolm X* (1964) 54

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National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) 52, 61, 84

National Conference on Corrections, *We Hold These Truths . . .* (1971) 61, 83

New York State Special Commission on Attica, *Attica: The Official Report* (1972) 52, 53, 54, 61, 67

Pappas, ed., The Jail: *Its Operation and Management* (1970) 61

Pepper, *Prisons in Turmoil,* 36 Fed. Probation 3 (1972) 59

The Recorder, July 13, 1978 55

Sacramento Bee, August 10, 1977 55

Sacramento Bee May 15, 1978 55

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South Carolina Department of Corrections Collective Violence Research Project, *Collective Violence in Correctional Institutions: A Search For Causes* (1973) 55

Stockton Record, September 26, 1977 55

Tracy Press, November 14, 1977 54

U.S. Commission on Civil Rights, *Civil Rights* (1963) 52